Supreme Court, U.S.
FILED

MAR 27 2007

OFFICE OF THE CLERK

No. 07-111

In the

Supreme Court of the United States

Orpha McGee
(Petitioner)

V

Arlene Helmus, Barbara Dye, Joe Garcia,
And Brenda Garcia,
(Respondents)

Petition For a Writ of Certiorari To

The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

John G. Rust
Counsel of Record
4628 Lewis Avenue
Toledo, Ohio 43612
(419) 476-0347
Attorney for Petitioner

QUESTIONS PRESENTED

1. Failure on the part of the Defendants to allege and prove that the Plaintiff was given a full and fair Hearing to present in the first Court, the Plaintiff's claims, defeats Res. Judicata and Collateral Estoppel, each are affirmative defenses, even though the Party who was denied the Hearing, failed to take an appeal from the first Court.

2. In an Action in a State Court where two (2) Daughters sue two (2) Sisters, alleging and offering Evidence before and after the death of the Mother, Mrs. Ethel Mae Thompson, that the Defendant Sisters had intentionally and wrongfully interfered with the Plaintiffs' Rights Of Inheritance, charging one Sister having the Mother's power Of Attorney, converting and obtaining, without consideration, houses, a car, valuable antiques and converting and concealing the Mother's money, and bank account, without consideration, and without ever giving receipts nor an accounting, and the Defendant Sisters alleging that the Mother's estate had been duly administered in the probate Court and all property duly given to each Sister, but the Defendant Sisters, in pleading Res. Judicata, and Collateral Estoppel, Affirmative Defenses, but if Defendants fail to plead and prove that the Plaintiff Sisters were given a full and fair opportunity for Plaintiffs to state their objections, and complaints; and

the Plaintiff Sister, by her Affidavit, swears and the Probate Docket shows only one Hearing for Complaints and objections was ever scheduled, and the Probate Docket, and Plaintiff, by Affidavit, swears when she went to the scheduled Hearing, with her Attorney, no Hearing was held, because, as the Probate Staff person stated, when Plaintiff and her Counsel appeared for the Hearing, that the Hearing was cancelled, and would be rescheduled because of the funeral of the Defendants' Attorney's Mother; and the Docket shows it was never rescheduled nor held, before or after the estate was closed; and Plaintiff's evidence of deeds and other transfers to the Sisters who had used a Power Of Attorney to run and control the Mother's properties, but the oldest Sister, who had controlled the Mother's properties with a Power Of Attorney from the Mother, never at any time ever gave any accounting nor receipt for money and properties received by the two (2) Defendant Sisters with the Power Of Attorney

PARTIES TO THE PROCEEDINGS

All the present Parties are stated on the front page. When the suit was first filed, Sister Dorothy Tolbert was a Plaintiff, but she has passed away.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE BASIS OF JURISDICTION IN THISCOURT . 1

STATUTORY PROVISIONS INVOLVED 1

REASON FOR GRANTINGTHE WRIT 2

STATEMENT OF THE FACTS 5

DIRECT AND CONCISE ARGUMENT 15

APPENDIX 1A

OHIO SUPREME COURT 1A
RECONSIDERATION ENTRY
DECEMBER 29, 2006

OHIO SUPREME COURT ENTRY 2A
DENYING JURISDICTIONAL
MEMORANDUM
DECEMBER 29, 2006

ERIE COUNTY COURT OF APPEALS 3A
ERIE COUNTY, OHIO
DECISION AND JUDGMENT ENTRY
JULY 11, 2006
JUNE 16, 2006

ERIE COUNTY COURT OF APPEALS 6A
DECISION AND JUDGMENT AFFIRMING
FILED JULY 16, 2005

ERIE COUNTY COURT OF COMMON PLEAS 16A
OPINION AND JUDGMENT ENTRY
GRANTING SUMMARY JUDGMENT
FILED MAY 5, 005
JOURNALIZED MAY 9, 2005

TABLE OF AUTHORITIES

ALLEN V. MC CURRY 2
449 US 90, 86 L ED 2D 308 (1980)

47 AMER. JUR.2D, JUDGMENTS, SECTION 474 18

47 AMER. JUR.2D,JUDGMENTS, SECTION 574 19

DUMAS V. ESTATE OF DUMAS 17
68 Ohio St.3d 405 (1986)

FIRESTONE V. GALBREATH 18
67 Ohio St.3d 87 (1993)

GOODSON V. MCDONOUGH (1983) 18
2 Ohio St.3d 182

OHIO RULES OF CIVIL PROCEDURE 56

OHIO RULES OF CIVIL PROCEDURE 56, [C] 26, 27

STONE V. POWELL 3
428 U.S. 465, 49 l.ED.2D 1067
96 S.CT.3037

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

On November 1, 2006, the Ohio Supreme Court issued its Entry which denied our Memorandum In Support Of Jurisdiction, which had been timely filed on July 31, 2006,which had moved the Ohio Supreme Court to Reconsider its entry filed November 1, 2006, which had denied our Notice of Appeal, and our Memorandum In Support Of Jurisdiction, filed timely on July 31, 2006, which in time had been filed in the Ohio Supreme Court's time of 45 days from the final "Decision and Judgment Entry" of June 16, 2006, of the Erie County Court Of Appeals.

Plaintiff-Appellant Orpha McGee had appealed the Erie County Court Of Appeals timely on July 15, 2006, or within the 30 day limit in Ohio for Appeals from the Court Of Common Pleas Of Erie County, Ohio, final Judgment of June 16, 2006.

STATUTORY PROVISIONS INVOLVED

This Petition is based on the Fourteenth Amendment, and the Federal Statute on Full Faith And Credit.

REASON FOR GRANTING THE WRIT

Every Court receiving a claim on a defense of Res. Judicata, Collateral Estoppel, or similar issues, should require the Party so requesting to allege and prove, by the burden of proof, that the person against whom Res. Judicata is to be pled, has had a full and fair opportunity in a Court to tell all material in the Party's claims or defenses, with all specifics; and without such Pleading and Proof, the Party cannot allege such claims, or defenses, nor require any Party so claimed to have been subject to Res. Judicata or Collateral Estoppel, to have appealed from any adverse Court Ruling of which the said Res. Judicata defense was first held.

We claim such was the essential holding in **Allen v. McCurry**, 448 US 90, 66 L.ed.2d 308 (1980), and in that case PlaintiffWilly McCurry brought a Section 1983 Action against Allen and other Police Officers, for the damage caused him by an unconstitutional warrantless search of his home.The Defendant Officers asserted as defense, various rulings in the criminal action against McCurry for shooting and injuring two of the Defendant Police Officers.The Defendant Police Officers asserted "Issue Preclusion" because McCurry in a Habeas Corpus proceeding "because he did not assert that the State Courts had denied

him a "full and fair" opportunity to litigate his search and seizure claim, McCurry was barred by this Court's decision in **Stone v. Powell,** 428 U.S. 465, 49 L.ed.2d 1067, 96 S.Ct. 3037, from seeking a Writ Of Habeas Corpus in a Federal District Court, but this Court rejected such defense, and held as follows in 448 U.S. at Page 494:

"[2] The federal courts have traditionally adhered to the related doctrines of Res. Judicata and collateral estoppel. Under Res. Judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Cromwell v County of Sac, 94 US 351, 352, 24 L Ed 195. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.Montana v. United States 440 US 147, 153, 59 L Ed 2d 210, 99 S Ct 970.5As this Court and other courts have often recognized, Res. Judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.Id., at 153-154, 59 L Ed 2d 210, 99 S Ct 970.

[3] In recent years, this Court has reaffirmed the benefits of collateral estoppel in particular, finding the policies under-lying it to apply in contexts not formerly recognized at common law.Thus, the Court has eliminated the requirement of mutuality in applying collateral estoppel to bar litigation [449 US 95] Of issues decided earlier in federal-court suits, Blonder-Tongue Laboratories, Inc. v University of Illinois Foundation, 402 US 313, 28 L Ed 2d 788, 91 S Ct 1434, and has allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a new federal suit against the party who lost on the decided issue in the first case, Park-Lane Hosiery Co. v Shore, 439 US 322, 58 L Ed 2d 552, 99 S Ct 645.6But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the part against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. Montana v United States, supra, at 153, 59 L Ed 2d 210, 99 S Ct 970,"(Underscoring Counsel's).

STATEMENT OF THE FACTS

In this Action for Intentional Interference by Defendants of Plaintiff's Rights Of Inheritance, an excellent statement of the facts is in Plaintiff's Brief, filed November 15, 2005, in the Erie County Court of Appeals, Appeal No. E-05-043, Trial Court No. 97-CV-049 and Trial Court No. 2002-CV-357.

After the first Appeal, which Respondents brought and lost, the first case, 97-CV-049 and the second were consolidated

The most complete statement of how Defendants worked their repeated efforts at "getting away" and converting the Mother's bank accounts, antiques, houses, and monthly income from Defendant Arlene Helmus securing the Mother's Power Of Attorney up until the Mother's death on June 18, 2003, is in Plaintiff's Brief in the last Appeal, refers to Plaintiff's Affidavit, 40 plus pages, which was filed in this Action on June 25, 1999, in support of Plaintiff's Motion For A New Trial; and in part reads at Page 6:

"In Mrs. Orpha McGee's Affidavit, filed June 25, 1999, served timely June 24, 1999, are the following supporting facts: P.. Mrs. Thompson won $250,000.00 lottery, $10,000.00 annually after taxes; 1982 wanted and bought larger home

to house, 3000 sq. ft., multiple antiques; P.2 Defendant Arlene Helmus took mother to Toledo Attorney and put larger Strub Road home in Arlene Helmus' Daughters name in trust for Mrs. Thompson; P.3.Plaintiff McGee by 3 year Court battle; gets property back; Mother had mental breakdown; was suicidal; not able to take care of her affairs; P. 4. Arlene Helmus takes mother to Tiffin Attorney P.O.A. given Arlene; after Doctors Green and Lee had testified mother couldn't handle own affairs; P. 4, 5.Arlene takes mother to Kentucky; Strub Road big house sold; mother called Orpha, and Orpha then handles affairs so mother and Mr. William McClure, who had lived many years with Mr. and Mrs. Thompson, bought 4618 Columbus, with Mr. McClure's $1,300.00 monthly income and Mrs. Thompson's $1,200,00 monthly income, and Mrs. Thompson's $25,000.00 down payment by her P.O.A., Defendant Helmus bought Tiffin Ave., and P. 6. Mrs. Thompson moved there, and P. 7 back to Columbus Avenue house; P. 8. Mrs. Thompson becomes ill and bed ridden; Orpha asks Arlene to take care of Mother Arlene refuses, and threatens to put mother in nursing home."

Under **Ohio Rule 56 for Summary Judgments Proof Of Proceedings** in the Probate Court must be by Certified Copies of the proceedings in the Probate Court.In the Court Of Common Pleas, on Defendants' first Motion For Summary Judgment, Plaintiffs Orpha

McGee and Dorothy Tolbert, each claimed in the Defendants' first Motion For Summary Judgment that Defendants offered no evidences of what the proceedings were in the Probate Court, because they offered no Certified Copies of such Probate Court Proceedings

In the Court Of Common Pleas, Erie County, Ohio, at the first Trial, Plaintiff Dorothy Tolbert, who before, one or two times, had come twice before from Texas, couldn't come to testify in the first Trial, because her Husband was terminally ill. Mrs. McGee became so ill that she couldn't testify on Friday, and had to go to the hospital on Friday, and also on Monday, and then Common Pleas Judge Maschari directed a Verdict for Defendants. Then, this Counsel was hired, and timely filed a Motion for a new Trial because of Plaintiff McGee's illness, and then Plaintiff McGee timely prepared and filed her 40 page plus Affidavit, where in she swore to all the facts, which was timely filed as a part of Plaintiff's Motion For A New Trial, timely filed and supported by Dr. Baxter's Deposition, and after a long delay, Judge Maschari granted Plaintiff's Motion For A New Trial, and just before the day set for Trial, Defendants appealed from the Order granting a New Trial.

In their Appeal, Defendants-Appellants tried to prove all the Probate Court proceedings, by offering in the Erie County Court Of

Appeals, Certified Copies of the same, but the Court Of Appeals of Erie County ruled that since the Certified Copies of the Erie County probate Court had not been filed in the Court Of Common Pleas, then they were not a part of the Record, and could not be offered to the Court Of Appeals by tendering the Certified Copies to the Erie County Court Of Appeals.

The Erie County Court Of Appeals then affirmed the grant of a new Trial by Judge Maschari, and the case was remanded o the Court Of Common Pleas.

Defendants, then by 2 partners of Attorney Zieher, who handled the Trial, and Appeal, filed Defendants Second Motion For Summary Judgment, relying on Res. Judicata from Probate Court filings, but again, offered no Certified Copies of the Erie County probate Court in the Estate of Mrs. Ethel Mae Thompson, nor in another Complaint.

Thus, there never has been any offer of the Certified Copies of the Proceedings in the Probate Court on which Defendants claimed Res. Judicata.

Likewise, in the Second Appeal, Defendants again offered Certified Copies of the Erie County Probate Court, and again, the Erie

County Court Of Appeals held that such were not admissible, nor to be considered by the Erie County Court Of Appeals.

Then, Defendants filed their second Motion For Summary Judgment, and newly elected Judge Tygh Tone granted Defendants' Second Motion For Summary Judgment, and Plaintiff McGee, as her Sister Mrs. Dorothy Tolbert had passed away, brought her First Appeal, but the Erie County Court Of Appeals, by a trio of two (2) newly elected Judges, and one prior Judge, Affirmed Judge Tone's grant of Summary Judgment, and Plaintiff McGee has appealed to the Ohio Supreme Court, who voted not to take Jurisdiction on Plaintiff's Appeal, and Plaintiff has timely appealed to this Court, from the Ohio Supreme Court's Denial of Plaintiff's Motion For Reconsideration by the Ohio Supreme Court.

Plaintiff claims the Ohio Supreme Court, and the Erie County Court Of Appeals have each committed Reversible Error, on Res. Judicata and all other issues, and we respectfully move the United States Supreme Court to Grant Certiorari. We shall discuss later, our grounds for all our claims of serious wrongdoing by each Ohio Court.

Respondents Arlene Helmus and Barbara Dye, by Undue Influence, and "Flat Out" conversion of many valuable antiques of the Parties Mother, Mrs. Ethel Mae Thompson, so deprived Plantiffs --

Appelles of inheriting money and property that would have been theirs under the Will, which gave each Daughter one-fourth (¼)of the estate. As it was Defendant Arlene Helmus by using the Power of Attorney obtained from her Mother, by an Attorney Mrs. Thompson had never seen before, to place in Defendant Helmus' name the property on Tiffin Avenue, purchased at around $60,000.00, and the Columbus Avenue property, purchased at $80,000.00, ended up in Arlene Helmus' daughter and her Husband, Brenda and Joe Garcia's name, who were supposed to care for the Parties Mother, Mrs. Thompson, but in practice, Defendants Brenda and Joe Garcia practically abandoned Mrs. Thompson, and Plaintiff Orpha McGee took care, and did more for her Mother, Mrs. Thompson, than any other Party.

In Mrs. Orpha McGee's Affidavit, filed June 25, 1999, she also states at Page 10, Arlene argues hotly with Orpha, and their Sister Plaintiff Tolbert. Arlene Helmus by her P.O.A. in 1993, signs Mother's van, around $8,000.00 in van, over to Plaintiff Dorothy Tolbert.

In P. 12-13, Plaintiff Orpha McGee had received $5,000.00 for Mother's burial from Arlene by P.O.A. for Mother, if Mother passed. Sister Defendant Barbara Dye demands $1,00.00 from Orpha McGee, and Orpha gives Barbara Dye $1,000.00, from burial money.

In P.14, Arlene threatens to put mother in nursing home, if Orpha doesn't send $500.00 from burial money to Arlene's Daughter Brenda Garcia for plane ticket to here. Also, Defendant Barbara Dye had U-Haul truck at Mother's home, loading it up with Mother's antiques. Mrs. Orpha McGee tells her Sister Barbara Dye not to take Mother's antiques. Barbara next day drives off with U-Haul truck and load of Mother's antiques.

In P. 14-15, Mrs. McGee describes Brenda's habitual leaving Mother Thompson and Mr. McClure lone in Columbus Avenue house - no care, and apparently drinking all day and night and returning 10-11:00 P.M. Brenda would not change thought Orpha asked her to look after Mother.

P. 16-18, Arlene threatens Orpha to sign Columbus Avenue house, which secretly Arlene had deeded to Orpha, over to Brenda, so Brenda would come back from Texas, or else Arlene will put Mother in nursing home; and Orpha then signed Columbus Avenue over to Brenda and Joe Garcia, her divorced ex-husband. Orpha then was depressed from fighting and arguing by Arlene, and

Barbara Dye when Barbara here, and Orpha then seeing Dr. Lee for her depression, signed Columbus Avenue to Brenda, because of

threats of Arlene. During this time, and before the transfer of Columbus Avenue to Brenda and Joe Garcia, Orpha wrote and asked Dorothy Tolbert to return van, and Barbara Dye to return antiques. This was backed up by letters from Attorney Mark Stuckey to Dorothy and Barbara. In P.19, Plaintiff Dorothy Tolbert, when called by Plaintiff McGee to return the van, told Plaintiff McGee, that Arlene had told Dorothy that Dorothy didn't have to return the van, nor Barbara the antiques. In P.20, Defendant Barbara Dye called Attorney Stuckey, said "Orpha was crazy", and that Arlene and Barbara "was going to have Orpha put away". On May 20, 1993, Joe returned to Sandusky, married Brenda, and after Joe said he would care for Mother and Mr. McClure, neither he nor Brenda did, frequently leaving in the morning and not returning until late at night; and Joe dismissed Mildred Forsythe from caring for Mrs. Thompson and Mr. McClure.

In P. 21, Mrs. McGee swore:

"One day I went to see Mother Joe and Brenda took off My Mother had feces under her fingernails and around her nail cuticles. Her fingers had just been wiped off and not washed. Mildred Forsythe stopped by to see Mother when I had a wash basin washing Mothers hands."

At Page 22:

"I went to pieces William "Bill"Mc.Clure had to be taken to the hospital."

Mrs. McGee made arrangement for her Mother to be buried in Kentucky.

At Page 23, Mrs. McGee swore:

"After Sister Barbara got $1,000.00 of the $5,000.00 to bury Mother, and $500.00 for Brenda's plane ticket to come from Texas, I had to take $1,020.00 of my money to bury my Mother that I never got back from Mother's Estate. My Husband had back problems from surgery and he couldn't drive me to Kentucky. I was so torn up nervous etc., my Husband was afraid for me to drive alone to Kentucky. I hadn't seen Sister Arlene since April. Arlene, Joe and Brenda went to Kentucky for Mother's funeral. They never asked me to go with them. I said my goodbye to Mother here in Sandusky."

At Page 24, Mrs. McGee swore:

"About July 1993, I hired Attorney Duane Golloway to get a Guardian over William "Bill" McClure's finances so Joe and Brenda Garcia could not drink up and squander this 79-80 year olds, about $1,300.00 a month income, and that Bill owned one-half interest in my Mother's home. Sister Arlene, and Joe and Brenda Garcia told everybody that Orpha McGee was crazy.William "Bill" McClure's family doctor, Dr's Ackley

and Bill's heart doctor, Dr. Chauvan, confirmed that Bill was not capable of handling his affairs. A closed Hearing was held and Robert Delamatre "Attorney" was appointed Guardian over Bill's finances."

Then at P. 24, Brenda and Joe Garcia, who were paid by Mr. McClure, one-third (1/3) of all expenses for the Columbus home, told all of Mr. McClure's friends not to come to see him, and

at Page.25, Mrs. McGee swore:

Bill became a prisoner of neglect and abuse, had to say what Sister Arlene Helmus, Joe & Brenda Garcia wanted Bill to say, when home alone Bill was told if he went outside the police would lock hi up, not allowed to use the telephone, had to put up with Brenda & Joe's drinking, fighting, etc. for four (4) years, until Bill was put in nursing home."

DIRECT AND CONCISE ARGUMENT

The longer Attorneys are out of Law School, the less most of them know of our great Constitution.

- Judges need to be directly ordered to seek out and to follow our constitution.
- This Petition, if taken, will serve to clarify this area of the Law.

First of all, to cause the Judges to better follow the Fourteenth Amendment, this case should be taken.

Every constitutional Duty needs to be heightened, a greater respect for following, fully and fairly, is obviously needed.

This Petition gives this distinguished and Able Court, truly and fairly, to help to follow its high an World recognized Traditions.

The Constitutional needs for our Courts call for our Petition For Certiorari to be granted.

Petitioner claims that the Fourteenth Amendment gives her a Constitutional right to a Hearing in the Probate Court to testify and state, at a Hearing like the one scheduled for October 12, 1993, **(BUT WAS NEVER HELD)** in the Probate Court in the proceedings entitled Application To Relieve The Estate From Administration, in the Court Of

Common Pleas, Probate Court Division, Erie County, Ohio for the purpose of showing the Estate should not have been relieved, but instead, there should have been a full investigation, of all that Arlene Helmus and Barbara Dye, Daughters of the Deceased, to try to find out whether Defendants have **"swindled"** the Estate out of thousands of dollars. The Law seems to be that if the Probate Court intended to give a Hearing to Plaintiff McGee, **but didn't**, then Res. Judicata does not provide a Defense, and that's the way it should be.

In our Brief, filed in the Erie County Court Of Appeals, on July 25, 2005, this Counsel stated at Page 16:

"The most strong precedent on this requirement that Defendants-Appellees herein face is **Allen v. McCurry** 449 US 90, 86 Led.2d 308 (1980) where the United States Supreme Court held, in 66 L.ed.2d at page 313:

"But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case.Montana v. United States, supra, at 153, 59 L.ed.2d 210, 99 S. Ct 970."(Underscoring Counsel's)

In **Dumas v. Estate of Dumas**, (1986) 68 Ohio St.3d 405, the Court held at page 408:

"The jurisdiction of the probate division is set forth in R.C. 2101.24.Our holding in Schucker v. Metcalf (1986), 22 Ohio St.3d 33, 35, 22 OBR 27, 29, 488 N.E.2d 210, 213, states that pursuant to R.C. 2101.24, "the probate division has no jurisdiction over claims for money damages arising from allegations of fraud."

Judge Tone is denying Summary Judgment on May 6, 2005, in his Opinion and Judgment Entry at Page 4, Judge Tone ruled Plaintiffs Orpha McGee and Dorothy Tolbert ere not proper Parties to bring their Action for Defendants wrongful and intentional interference with Plaintiffs'rights to inherit their share of all property Defendants took from their Mother.At Page 4 of Judge Tone's Opinion and Judgment Entry states:

"...In this case neither Plaintiff Orpha McGee nor Defendant Dorothy Tolbert were the personal representatives in this matter and therefore they cannot stand in decedent Ethel Mae Thompson's shoes to assert claims on behalf of the estate."

The Trial Court, in order to show that the Court was following precedent, when in fact the Court was "reaching" for something valid, asserted that Petitioner Orpha McGee could not proceed because she was

not the Executor or other proper person. Although the Supreme Court of Ohio in **Firestone v. Galbreath**, (1993), 67 Ohio St.3d 87, held at Page 88:

"We find particularly instructive Restatement of the Law 2d, Torts (1979) 58, Section 774B, which provides: "Intentional Interference with Inheritance or Gift.

"One who by fraud, duress or other tortuous means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

We also find Commend d to Section 774B, at 59, enlightening.

"In response to certified question No. 2, we advise that any person who can prove the elements of the tort of intentional interference with expectancy of inheritance has right to maintain the cause of action."

The Erie County Court and the Ohio Supreme Court basically disregarded the Holding in **Goodson v. McDonough** (1983) 2 Ohio St.3d 182, which held Res. Judicata doctrine should be used to do Justice, not injustice. So here.

ANY PARTY ASSERTING THE AFFIRMATIVE DEFENSE OF RES. JUDICATA ON THE GROUNDS OF ISSUE PRECLUSION BEARS THE

BURDEN OF PROOF IN ESTABLISHING ALL THE FACTS AND EVIDENCES WHICH PROVE SUCH DEFENSE: ND SUCH PARTY MUST SHOW THAT THE PRTY AGAINST WHOM PRECLUSION OF ISSUES, AND RES. JUDICATA ARE CLAIMED, HAD A "..FULL AND FAIROPPORTUNITY TO LITIGATE THE ISSUE"; AND IF THE PARTY CLAIMING RES. JUDICATA DOES NOT MEET SUCH BURDEN OF PROOF, SUCH CLAIM OF RES. JUDICATA SHOULD BE DENIED.

Supporting the above is 47 **Amer. Jur.2d, Judgments, Section 574**.

574 reads in part as follows:

"574 Requirements of full and fair opportunity to litigate issue in prior action and of fairness the cases which abandon the mutuality rule agree that the doctrine of collateral estoppel can be invoked by a stranger to the judgment only against one who was a party, or in privity with a party, to the judgment and who had a full and fair opportunity in the prior action to litigate the relevant issue,1 and where it would not otherwise be unfair or unjust under the circumstances to permit the use of collateral estoppel.2Although courts have stated that no particular procedure is prescribed by the full and fair formulation,3 this

requirement recognizes, at a minimum, that a person cannot be bound by a judgment unless he or she has had reasonable notice of the claim against him or her and opportunity to be heard in opposition to that claim."

By **Ohio Rules Of Civil Procedure 56, [C]** in Summary Judgment, the Court can only consider facts proven by admissible evidences. The Court of Common Pleas, the Eric County Court of Appeals, each violated that Ruleand found admissible as proof of facts, **all** the Probate Court proceedings When the Opinion of each is read closely, each Court held that all Probate Court proceedings were before the Court. But none in truth were shown by any admissible evidences.

Each Court participated in **"reaching"** further than the evidence. Such raises an inference that each Court went, without cause, to favor, for some reason, Defendants, and such **"reaching"** should be condemned, because it causes rank injustice, and the people are caused, if and when informed, then to look down on the Courts.

Every Party who suffers from a Court's decision, which in truth, is based on the Court's prejudice against that Party, or prejudice in favor of the Party in favor of whom the Court rules for, feels sharply and

deeply the sting of prejudice. Unfortunately, our American system of Justice truly affords no relief; and only

The Supreme Court Of The United States is the sole remaining potential savior from such prejudice; and the United States Supreme Court, should so declare, and announces that the Fourteenth Amendment requires that to protect each Party's right, that henceforth, a Party may sue in special Courts, such Judges found to be so acting with prejudice and without legal grounds for all damages so caused from prejudicial treatment and the damage should be payable by the State Governments of that Judge so acting from prejudice, because that's the only realistic way the Party so suffering from prejudice can obtain any Justice.

Judges now face no liability, and there is no relief anywhere else. Thus, the guarantee of Justice to all in our United States Constitution so demands, and all steps should be taken to see that Justice is given every person.

INTENTIONAL FALSE AND MISLEADING MISREPRESENTATION, BY COUNSEL FIRST, AND THEN, COURTS, TRIAL AND APPELLATE, THAT THE PROBATE COURT, ERIE COUNTY, OHIO, HAD HELD A HERING, SCHEDULED FOR OCTOBER 12, 1993, FOR HEIRS TO STATE THEIR

OBJECTIONS TO RESPONDENT HELMUS' APPLICTION TO RELIEVE THE ESTATE OF ETHEL MAE THOMPSON,FROM ADMINISTRATION; BUT ***NO HEARING WAS HELD ON OCTOBER 12, 1993, OR THEREAFTER****, AS STATED BY PROBATE STAFF WOULD BE DONE.WHEN PETITIONER AND HER ATTORNEY WENT TO THE PROBATE COURT, THEN THE PROBATE STFF INFORMED THAT SINCE THE ESTATE'S ATTORNEY, FREDERICK D. WALDOCK HAD DAVISED THE PROBATE COURT THAT HIS MOTHER'S FUNERAL WAS HELD THAT DAY, THAT THEN THE PROBATE STAFF INFORMED PETITIONER AND HER ATTORNEY THAT THE HEARING ON OBJECTION TO THE ESTATE OF ETHEL MAE THOMPSON, PETITIONER'S MOTHER, WOULD BE RESCHEDULED LATER; BUT THE ATTORNEY WALDOCK DID NOT WANT PETITIONER OR OTHERS TO OBJECT TO ALL THE SWINDLING BY RESPONDENTS.* ***NO HEARING WAS EVER RESCHEDULED AGAIN!!! NO HEARING WAS EVER HAD THEREAFTER****. PETITIONER WAS THUS PREVENTED FROM TESTIFYING TO ALL THE SWINDLING BY ADMINISTRATOR ARLENE HELMUS, AND DEFENDANT DYE IN THIS ACTION.*

On November 19, 1997, in this case Attorney Frederick D. Waldock filed, in the Court Of Common Pleas, Erie County, Ohio "Defendants' Motion For Summary Judgment", and Attorney Waldock falsely stated at Page 2 of said Motion:

"...On October 12, 1993, a hearing was held in the Probate Court of Erie County, Ohio, for the release of the estate of Ethel Mae Thompson from administration, pursuant to Section 2113.03 of the Revised Code.Plaintiffs were Served with a notice of the hearing, and an Entry Relieving The Estate From Administration And Appointing Defendant, Arlene Helmus, Commissioner, was filed on November 2, 1993."

Respondent and her Counsel respectfully state to this Court that Attorney Waldock knew on November 2, 1993, that Respondents and he wanted the Estate of Ethel Mae Thompson closed s soon as possible, because Petitioner knew enough herself, and with her there with Attorney Stuckey, she could testify then to all the facts later stated in her Affidavit, filed in this Action on June 25, 1999, in support then of her Motion For A New Trial.

After Respondents' Appeal to the Erie County Court Of Appeals in this Action was denied, Respondents, by the same firm of Attorneys filed another Motion For Summary Judgment, and on May 3, 2005, by a

newly elected Judge, Judge Tygh M. Tone, Respondents Motion For Summary Judgment was granted, and in his Opinion and Judgment Entry of May 6, 2005, Judge Tone , at Page 1, found the following:

"The facts of this case re: Ethel Mae Thompson died on June 18, 1993.Arlene Helmus filed with the Erie County Probate Court an Application To Probate Will and an Application to Relieve the Estate From Administration.(See, Exhibit A-attached to Defendants' Motion for Summary Judgment).Notice was served by certified mail to all surviving children of the decedent and a hearing was scheduled on the Applications with the Erie County probate Court on October 12, 1993.As a result of the Applications and the hearing Arlene Helmus was appointed Commissioner of the Estate of Ethel Mae Thompson and thereafter filed a Report of Distribution which completed the administration process.On June 3, 1994, the Estate was closed."(Underscoring Counsel's).

In the last Appeal to the Erie County Court Of Appeals, from the holding by Judge Tone of Respondents' Motion For Summary Judgment, the Court Of Appeals, for the first time, ruled for Defendants-Appellees Arlene Helmus and Barbara Dye.**Judge Singer, for the Court also relied on the Probate Court Hearing on October 12, 1993, although**

there was no legal evidence before the Trial Court nor the Court Of Appeals, of the proceedings before the Probate Court on October 12, 1993, although in Judge Singer's Opinion, she stated there was a Hearing held on October 12, 1993,and Judge Singer's Decision and Judgment Entry of June 16, 2006, found and stated at Paragraph two (2) on the second page:

"{2}This case has a lengthy procedural history. It begins in 1993, when Ethel Mae Thompson died testate in Erie County, Ohio.Among her survivors were daughters Orpha McGee, Dorothy Tolbert, Arlene Helmus and Barbara Dye.All were beneficiaries under Thompson's will. Specifically, each of the daughters was to receive one-fourth of the estate.Arlene Helmus was named Executrix.Thompson's will was admitted to probate on August 2, 1993.On September 8, 1993, Arlene Helmus filed, in the Erie County Probate Court, an application to probate the will and an application to relieve the estate from administration.All of Thompson's surviving children received notice of the filings. A hearing was scheduled in probate court for October 12, 1993.At the hearing, Arlene Helmus was appointed Commissioner of the Estate of Ethel Mae Thompson. Helmus thereafter filed a report of

distribution and on June 3, 1994, the estate was closed."(Underscoring Counsel's).

This Counsel repeats, **there was no certified copies of the proceedings in Erie County Probate Court for October 12, 1993**, and by **Rule 56(C)** each Court should not have considered any of the proceedings in Probate Court.Petitioner, at this Counsel's instruction, secured a **certified copy of all the proceedings in the Estate Of Ethel Mae Thompson, Case No. 19931326,** and **there's no notation or words showing any Hearing was held on October 12, 1993; and there's no entry of any proceeding on October 12, 1993.**

We respectfully challenge Opposing Counsel to challenge what petitioner said in her Affidavit In Support Of Motion For A New Trial, **that Attorney Mark Stuckey and she went to the Probate Court on October 12, 1993, and the probate Staff person told them the Hearing was cancelled because of the funeral that day of the Mother of Attorney Waldock.**

The Code of Judicial Conduct by its Cannons Of Ethics did not stop the Trial Judge nor the Appellate Judges from disregarding the Rules that each Judge was not under **Rule 56(c)**, allowed to consider any fact or document which was not in admissible evidence form.

Such defiance of **Rule 56(c)** and of basic Appellate Rules was applied only as a particular Judge wanted to rule.

The non-compliance with the governing Rules of the Court Of Appeals did not stop the Court Of Appeals from just defying all the Rules and the Court Of Appeals also defied **the Fourteenth Amendment requirement that Res. Judicata must not be ruled against a Party, unless the Party in the Trial Court had been given a full and fair opportunity at a Hearing to state their objections** on all the swindling by Respondents Arlene Helmus, and Barbara Dye, as held in **Allen v. Curry,** 449 US 90 (1980).

Therefore, Petitioner and her Counsel respectfully move and request that this Court, in carrying out the Constitution, **REMAND** and establish a Court to sue Judges, or to provide a remedy so Petitioner and others like her may secure Justice.

Respectfully submitted,

"s/John G. Rust"
Attorney for Petitioner

APPENDIX

FILED
DEC 27 2006
MARCIA J. MENGEL, CLERK

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2006 DEC 29 am 10:56
BARBARA J. JOHNSON
CLERK OF COURTS

THE SUPREME COURT OF OHIO

ORPHA MCGEE ET AL. CASE NO. 06-1440

V. RECONSIDERATION

ENTRY

ARLENE HELMUS ET AL. ERIE COUNTY

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Erie County Court of Appeals; Nos. E05043, E05044, and E05066)

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

J26/1045
12-29-06

C.A.
FILED
NOV 01 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2006 DEC 29 am 10:54
BARBARA J. JOHNSON
CLERK OF COURTS

THE SUPREME COURT OF OHIO

ORPHA MCGEE ET AL. CASE NO. 06-1440

V. ENTRY

ARLENE HELMUS ET AL.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

J26/1044
12-29-06

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2006 JULY 11 pm 01:53
BARBARA J. JOHNSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

ORPHA MCGEE, ET AL.

APPELLANT

V.

ARLENE HELMUS, ET AL.

APPELLEE

AND

ORPHA MCGEE, ET AL.

APPELLANT

V.

JOE GARCIA, ET AL.

APPELLEE

Court of Appeals Nos. E-05-043
E-05-044
E-05-066

Trial Court Nos. 2002-CV-357
97-CV-049

DECISION AND JUDGMENT ENTRY

Decided: JUL 11 2006

* * * * * * * *

J26/566

7-11-06

C.A.

This matter comes before the court on appellant, Orpha McGee's "application for reconsideration, and also under App.R. 25, motion to certify a conflict." Appellant seeks reconsideration of this court's decision in McGee v. Helmus, 6th Dist. Nos. E-05-043, E-05-044, E-05-066, 2006-Ohio-3061.Appellant further asks this court to certify McGee v. Helmus, Id., as being in conflict with LaBonte v. LaBonte, (1988), 61 Ohio App.3d 209.

The standard applied to a timely motion for reconsideration filed in an appellate court is set forth in Matthews v. Matthews (1981), 5 Ohio App.3d 140, paragraph two of the syllabus:

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.(App.R.26, construed)"

Appellant has not called our attention to any obvious errors or raised issues we failed to consider.Moreover, we have thoroughly reviewed LaBonte v. LaBonte, supra, and conclude that McGee v. Helmus, supra is not in conflict with the Fourth District Court of

Appeals' decision in LaBonte.Accordingly, appellant's motion for reconsideration and to certify a conflict are denied.

Arlene Singer, P.J.	"s/Arlene Singer"
JUDGE	
William J. Skow, J	"s/William J. Skow"
JUDGE	
Dennis M. Parish, J.	"s/Dennis M. Parish"
CONCUR. JUDGE	

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

ORPHA MCGEE, ET AL.	Court of Appeals Nos. E-05-043
	E-05-044
APPELLANT	E-05-066
V.	Trial Court Nos. 2002-CV-357
	97-CV-049
ARLENE HELMUS, ET AL.	
APPELLEE	**DECISION AND JUDGMENT**
ENTRY	
	Decided: JUL 16, 2006

* * * * * * * *

JOHN RUST, FOR APPELLANTS.

KEVIN ZEIHER, FOR APPELLEES.

* * * * * * * *

SINGER, P.J.

{1}These appeals come before the court from the Erie County Court of Common Pleas wherein summary judgment was granted to Appellees. This court hereby consolidates E-05-66 with E-05-043 and E-05-044 for purposes of rendering a decision. For the reasons that follow, we affirm.

{2}This case has a lengthy procedural history. It begins in 1993, when Ethel Mae Thompson died testate in Erie County, Ohio. Among

her survivors were daughters Orpha McGee, Dorothy Tolbert, Arlene Helmus and Barbara Dye. All were beneficiaries under Thompson's will. Specifically, each of the daughters was to receive one-fourth of the estate. Arlene Helmus was named executrix. Thompson's will was admitted to probate on August 2, 1993. On September 8, 1993, Arlene Helmus filed, in the Erie County Probate Court, an application to probate the will and an application to relieve the estate from administration. All of Thompson's surviving children received notice of the filings. A hearing was scheduled in probate court for October 12, 1993. At the hearing, Arlene Helmus was appointed Commissioner of the Estate of Ethel Mae Thompson. Helmus thereafter filed a report of distribution, and on June 3, 1994, the estate was closed.

{3}On December 12, 1994, McGee filed a complaint in the Erie County Court of Common Pleas against Brenda Garcia, granddaughter of Ethel Mae Thompson and Garcia's husband Joseph. The complaint alleged breach of contract. According to the complaint, an agreement had been reached whereby the Gracias would receive interest in certain real estate in exchange for providing care and companionship to Ethel Mae Thompson until her death. On September 12, 1995, the case was voluntarily dismissed pursuant to Civ.R. 41(A).

{4}On June 2, 1995, Orpha McGee and Dorothy Tolbert filed suit in the Erie County Probate Court against Arlene Helmus, Harold and Barbara Dye and the Erie County Treasurer (Case No. 93-1-326A).The complaint alleged that Helmus had negligently and fraudulently administered the estate of Ethel Mae Thompson. On October 4, 1995, the court dismissed the compliant.

{5}On January 16, 1997, appellants McGee and Tolbert filed a complaint in the Erie County Court of Common Pleas against Appellees Arlene Helmus, Barbara Dye, Joe Garcia and Brenda Garcia. The counts against Appellees Helmus and Dye alleged intentional interference with an inheritance. The count against Appellees Joe and Brenda Garcia again alleged breach of contract. A jury trial commenced on April 21, 1999. On June 9, 1999, the trial court granted the Appellees' motion for directed verdict and dismissed the case with prejudice.

{6}On June 25, 1999, Appellants filed a motion for a new trial. The motion was granted on June 20, 2002.Appellees appealed the court's ruling to this court. On January 23, 2004, in McGee, et al. v. Helmus, et al., 6th Dist. No. E-02-026, 2004-Ohio-278, this court affirmed the decision of the trial court.

{7}On September 30, 2004, Appellees filed a motion for summary judgment. On May 6, 2005, the trial court granted the motion. Appellants now appeal setting forth the following assignments of error:

{8}"I. The trial court by its judgment entry in case no. 97-CV-049 and its judgment entry in case no. 2002-CV-357 committed reversible error in each case, because there were no certified and admissible entries from any other court which raised any issues of Res. Judicata; and plaintiffs below by their "plaintiffs [sic] responses and memorandum of law opposing summary judgment and for oral hearing hereon", pointed out there were no certified and admissible copies. Page 2 et seq., and plaintiffs below by plaintiffs appellants Orpha McGee submitted her lengthy, affidavit on June 25, 1999, attached to her motion for a new trial, showed evidence of undue influence, intentional interference with plaintiffs' rights of inheritance, by all defendants, and also a conspiracy between all defendants to cooperate with defendants Garcia in securing unlawfully the Columbus property, and other torts of conversion, conspiracy to commit the same, and the evidences submitted called for the denial of defendants [sic] summary judgment motion."

{9}"II. When a court orders the two (2) related cases to be consolidated, under Rule 42, and in the first case, a party files a motion

for summary judgment, the trial court can validly rule on the first case with its motion for summary judgment filed therein, but the trial court cannot grant summary judgment in the second case, because no motion was filed nor argued and briefed therein."

{10}"III. The trial court in granting defendant-Appellees" motion for summary judgment, prejudicially erred when appellant offers evidence and legal precedents, showing that there was no admissible evidence of any proceeding in probate court, because the references to said proceedings was not evidenced by certified copies nor by any other admissible evidence; and in the probate court proceedings plaintiff-appellant McGee was not given a full and fair opportunity to state her objections, which are basically stated in her compliant herein and voluminous conversion and deprivation of inheritance by defendant-appellees."

{11}Initially we will consider appellants' second assignment of error. Appellants contend that the Gracias did not file a motion for summary judgment. This argument is without merit as the record shows that appellants' cases against all Appellees were consolidated on September 15, 2004. On September 30, 2004, Arlene Helmus, et al., filed

a motion for summary judgment. Appellants' second assignment of error is found not well-taken.

{12}In their first and third assignments of error, appellants contend that the court erred in granting summary judgment to appellees.

{13}On review, appellate courts employ the same standard for summary judgment as trial courts. Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App.3d 127, 129.The motion may be granted only when it is demonstrated:

{14}"***(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. "Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{15}In granting summary judgment to Appellees on the two claims alleging tortuous interference with an inheritance, the trial court found appellants' claims to be barred by the doctrine of Res. Judicata.

{16}The doctrine of Res. Judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (known as collateral estoppel).We believe that this case involves the concept of claim preclusion. With regard to the claim preclusion element of Res. Judicata, the Supreme Court of Ohio has stated: "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction *** is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them" Norwood v. McDonald (1943), 142 Ohio St. 299, paragraph one of the syllabus.

{17}Later, in Natl. Amusements, Inc. v. Springdale (1990), 53 Ohio St.3d 60, 62, the Supreme Court of Ohio expanded upon that concept and stated: "It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.'"(Emphasis sic) (quoting Rogers v. Whitehall [1986], 25 Ohio St.3d 67).The court in Springdale further declared that "the doctrine of Res. Judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Id.

{18}The Supreme Court of Ohio has adhered to its earlier interpretation and applications of the doctrine of Res. Judicata. See Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, paragraph one of the syllabus, holding that under the doctrine of Res. Judicata "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claims arising out of the transaction or occurrence that was the subject matter of the previous action." See, also, Brown et al. v. City of Dayton et al. (2000), 89 Ohio St.3d 245.

{19}Further, the Supreme Court of Ohio has stated that the phrase "claims which might have been litigated" in the first lawsuit has possible misleading connotations and noted that courts "prefer to refer instead to 'claims which should have been litigated' in the first lawsuit." Holzemer v. Urban ski (1999), 86 Ohio St.3d 129, 133, fn. 2, citing Wilkins v. Jakeway (S.D.Ohio 1998), 993 F.Supp. 635, 645.

{20}In their complaint, appellants alleged that Appellees Helmus and Dye transferred, diverted or concealed certain items of tangible personal property that would have gone to appellants through the administration of probate had it not been for Helmus and Dye's tortuous actions. Appellants made the same claim against the same parties in 1995, in Case No. 93-1--326A which the probate court dismissed.

Appellants did not appeal that decision. Based on the foregoing, we conclude that the trial court did not err in finding appellants' claims of tortuous interference with an inheritance to be barred by the doctrine of Res. Judicata.

{21}As for appellants' claim of breach of contract against the Garcias, the court found that appellants lacked standing to bring the action. We agree. The contract at issue was between Ethel Mae Thompson and the Garcias. Under the agreement, the Garcias were to provide are for Thompson in consideration for Thompson retaining a life estate of her property with a remainder interest to be transferred to the Garcias at her death. With Thompson now deceased, any action on the contract with the Garcias can only be brought bya fiduciary appointed by the probate court to represent Thompson's estate. Neither appellant Helmus nor Tolbert serve in this role.Appellants' second and third assignments of error are not well-taken.

{22}Finding summary judgment to be appropriate in this matter, we affirm the judgment of the Erie County Court of Common Pleas.Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Erie County.Costs to appellant pursuant to App.R.24

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R.27.See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Arlene Singer, P.J. "s/Arlene Singer"
JUDGE

William J. Skow, J "s/William J. Skow"
JUDGE

Dennis M. Parish. J. "s/Dennis M. Parish"
CONCUR. JUDGE

This decision is subject to further editing by the Supreme Court of Ohio Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:

http://www.sconct.state.oh.us/rod/newpdf/?source=6

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE BARBARA J. JOHNSON, CLERK OF COURTS ERIE COUNTY, OHIO.

BY Betty A. Martin

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2005 MAY 3 pm 3:44
BARBARA J. JOHNSON
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

Orpha McGee, et al. Plaintiffs vs. Arlene Helmus, et. Al	CASE NO: 2002-CV-357 Jundge Tygh M. Tone **OPINION AND JUDGEMENT ENTRY**

****

This case is before the Court on Defendants Arlene Helmus, Barbara Dye, Brenda Garcia and Joseph Garcia's Motion for Summary Judgment pursuant to Ohio Rule of Civil Procedure 56.Plaintiffs Orpha McGee and Dorothy Tolbert filed a Response and Memorandum of Law Opposing Summary Judgment and for Oral Hearing on November 3, 2004.Upon review of the pleadings and applicable case law the Court finds that Defendants Motion for Summary Judgment is granted.

I.

The facts of this case are:

Ethel Mae Thompson died on June 18k, 1993.Arlene Helmus filed with the Erie County Probate Court an Application to Probate Will

and an Application to Relieve the Estate from Administration.(See, Exhibit A-attached to Defendants' Motion for Summary Judgment).Notice was served by certified mail to all surviving children of the decedent and a hearing was schedule on the Applications with the Erie County Probate Court on October 12, 1993.As a result of the Applications and the hearing Arlene Helmus was appointed Commissioner of the Estate of EthelMae Thompson and thereafter filed a Report of Distribution which completed the administration process. On June 3, 1994, the Estate was closed. On May 30, 1995, approximately two (2) years after the death of Ethel Mae Thompson and one (1) year after the estate had been closed, the Plaintiff Orpha McGee (hereafter known as Plaintiff McGee) filed an Application for Authority to Administer the Estate. In that same year on June 2, Plaintiff McGee filed a complaint in the Common Pleas Court of Erie County, Ohio, naming Arlene Helmus, Harold Dye and Barbara Dye as Defendants. Plaintiff McGee alleged that Arlene Helmus had negligently and fraudulently administered the Estate of Ethel Mae Thompson and specifically claimed that Arlene Helmus had failed to include a parcel of real estate and tangible personal property as assets of Ethel Mae Thompson's estate. On October 4, 1995 the Erie County Probate Court (case no. 93-1-326A)

dismissed this complaint. No motion for reconsideration or an appeal was ever filed.

A Judgment Entry was filed by the Erie County Probate Court on November 1, 1995, ordering the Estate to remain closed. On December 12, 1994, Plaintiff McGee filed another complaint in the Common Pleas Court of Erie County, Ohio naming Brenda and Joseph Garcia as defendants. Plaintiff Orpha McGee alleged a contractual arrangement between the decedent and the Garcias was breached. The contractual document involved the Garcias residing in the residential property with Ethel Mae Thompson providing her with supportand in consideration of such action by the Garcias the residential real property was transferred at Ethel Mae Thompson's death to the Garcias. The quit claim deed and the Memorandum of Agreement were both executed by Plaintiff McGee. This matter was voluntarily dismissed pursuant to Ohio Rule 41(A) on September 12, 1995.

Then on January 16, 1997 Plaintiffs McGee and Dorothy Tolbert filed a three-count compliant against Arlene Helmus, Barbara Dye, Joseph and Brenda Garcia. Plaintiffs alleged Tortious Interference with Expectancy of Inheritance against Defendant Arlene Helmus, Tortious Interference with expectancy of Inheritance against Defendant Barbara Dye and Breach of

Contract against Joseph and Brenda Garcia. The aforementioned courts constitute the subject of said Motion for Summary Judgment.

II.

In order for the Court to grant Defendants' Motion for Summary Judgment pursuant to Civil Rule 56 the moving party must prove that (1) there is no genuine issue of material fact, (2) the he is entitled to judgment as a matter of law and (3) after construing the evidence most favorably for the non-moving party, reasonable minds can only reach a conclusion averse to him. Armstrong v. Best Buy Co.

(2003), 99 Ohio St.3d 79.The moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning the essential elements of the non-moving parties case. Dresher v. Burt (1996), 75 Ohio St.3d 280.If the moving party meets this burden, the non-moving party must come forward with specific facts showing a genuine issue of material fact in order to escape summary judgment. Wing v. Anchor Media, Ltd. Of Texas (1991), 59 Ohio St.3d 108.

III.

In Defendants' Motion for Summary Judgment, Defendants first address the issue of Tortious Interference with Expectancy of Inheritance against Defendant Arlene Helmus. In Court One of Plaintiffs' complaint it is alleged that Defendant Arlene Helmus transferred, diverted or concealed certain items of tangible personal property and deprived Plaintiffs McGee and Tolbert of various tangible property that would have been theirs by way of the administration of probate if it had not been for the Defendant's actions. Defendant Arlene Helmus argues, that the Plaintiffs have no standing to bring this cause of action because neither Plaintiff Dorothy Tolbert nor Plaintiff McGee were fiduciaries of the Estate of Ethel Mae Thompson. According to the Defendant this is a claim that should be advanced by the fiduciary of the Estate and because of the doctrine of Res. Judicata any such claims in relation to this matter should be denied.

Before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.Ohio Contractors Assn. v. Bicking (1994), 71 Ohio St.3d 318.When determining whether a party has standing, Ohio courts have applied Oho Rule of Civil Procedure 17 (A) requirement that a party must be a "real party in interest."State ex rel. Sinay v. Sodders (1997), 80 Ohio St.3d 224.Lack

of standing challenges the legal capacity of a party to bring an action...State ex rel. Dallman v. Franklin Cty.Court of Common Pleas (1973), 35 Ohio St.2d 176. The personal representative of decedent's estate may ordinarily prosecute, in a representative capacity, any cause which the decedent could have instituted and which survives the decedent.Thus, a persona representative of a decedent's estate stands in the shoes of the decedent to assert claims on behalf of the estate. Hosfelt, Adm., v. Andrew Miller, et al, 2000 Ohio PP. LEXIS 5506.In this case neither Plaintiff Orpha McGee nor Defendant Dorothy Tolbert were the personal representatives in this matter and therefore they cannot stand in decedent Ethel Mae Thompson's shoes to assert claims on behalf of the estate.

Similarly the Plaintiffs also allege Tortiuous Interference With Expectancy of Inheritance against Arlene Helmus.This count involves the same parties and disputes raised by Plaintiff McGee in 93-1-326A, which was dismissed by the Erie County probate Court on October 4, 1995.Thus this issue has already been the subject of a final appealable order. Plaintiffs failed by motion to have the matter reconsidered. Plaintiffs failed to appeal the Probate Court's decision to the Appellate level.As such, the doctrine of Res. Judicata applies.1 Restatement of the

Law 2d, Judgments (1982), sections 24-25 states "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."Underlying all discussion of Res. Judicata is the principle of fundamental fairness in the due process sense. Given the fact that Eric County Probate Court entertained the cause of action under a previous case number and that the matter was voluntarily dismissed by judgment entry with no further appellate process being initiated by Plaintiffs the matter relating to the alleged transfer and/or concealment of tangible personal property is forever barred.

Thirdly, also under the complaint against Defendant Arlene Helmus is the allegation that the Defendant failed in her capacity as Commissioner for the Estate of Ethel M. Thompson. Defendant replies that even if this allegation were true, which allegation Defendant denies, Plaintiffs have failed to file any objections or exceptions to Form 5.1 and 5.9 (Forms-Assets and Liabilities; Report of Distribution-respectively) of the deceased. A claim or an objection to administration must be brought within one year of the date of death. Ethel Mae Thompson died on June 18, 1993.The complaint was filed January 16, 1997, approximately four (4) years later. Despite the fact that Plaintiffs were served with probate

forms and hearing notices Plaintiffs failed to protect their own perceived interest.

IV.

Count Two of Plaintiffs Complaint alleges Tortious Interference With Expectancy of Inheritance against Defendant Barbara Dye. Plaintiffs argue the same issues as stated above, ie. Tangible, personal property was not properly transferred depriving Plaintiffs of such items. In this regard the above ruling stands: The Plaintiffs have no standing; Plaintiffs are barred by the doctrine of Res. Judicata and thus Plaintiffs are barred from litigating this matter in this Court.

VI.

The final count of Plaintiffs' compliant is Breach of contract against Defendants Brenda Garcia and Joseph Garcia. Plaintiffs argue that the Garcias breached the agreement made with Ethel Mae Thompson to provide care and companionship during her life. On May 10, the Garcias entered into a Memorandum of Agreement with Ethel Mae Thompson whereby they would provide care for Ethel Mae Thompson in consideration for Ms. Thompson retaining a life estate of her property with a remainder interest to be transferred to the Garcias at her death.

The duration of the agreement was somewhat brief with Ethel Mae Thompson dieing on June 18.The real party in interest here are the Garcias.A real party in interest is one who, under substantive law, has an interest in the subject matter of the suit and who possesses the right, as a matter of substantive law, sought to be enforced. In re Highland Subdivision (1971), 27 Ohio App.2d 237. In Shealy v. Campbell (1985), 20 Ohio st.3d 23, the Supreme Court of Ohio stated: "To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief." Id. at 25.In this matter, the contract was between Ethel Mae Thompson and the Garcias. Thus the persons entitled to remedies would be Ethel Mae Thompson and the Garcias. A breach of contract must then be brought by a fiduciary appointed by the Probate Court to represent Ms. Thompson's estate. Again, the Plaintiffs have no standing in this regard.

VI.

JUDGMENT ENTRY

It is **ORDERED** that Defendants' Motion for Summary Judgment is granted pursuant to Ohio Rule of Civil Procedure 56.This matter is dismissed. **THIS IS A FINAL APPEALABLE ORDER.**

5/2/05 "s/TYGH TONE"

DATE JUDGE TYGH TONE